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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 865

HUGH McINTOSH, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Hugh McIntosh, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming his conviction in the United States District Court for the Eastern District of New York on a charge of robbery of merchandise moving in interstate commerce in violation of 18 U.S.C. § 1951 and of conspiracy to commit such a robbery.

OPINION BELOW

The opinion of the Court of Appeals, not yet officially reported, is printed as Appendix A to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on April 15, 1970. A timely petition for rehearing was denied, without opinion, on May 8, 1970. By an order dated May 27, 1970, Mr. Justice Harlan extended the time for filing this petition to and including July 7, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the government engaged in misconduct which deprived petitioner of a fair trial before an impartial jury, as guaranteed by the Sixth Amendment, by announcing the calling of its star witness, the widely notorious Joseph Valachi, in a manner calculated to produce highly prejudicial and inflammatory publicity.

2. Whether the publicity which surrounded the appearance of Valachi, read by all of the jurors, was so inherently prejudicial that petitioner was denied his Sixth Amendment right to a trial before an impartial jury.

3. Whether testimony by government witness Valachi concerning conversations with two of petitioner's co-defendants, in which they linked petitioner with the crime charged, deprived the petitioner of his Sixth Amendment right to confront the witnesses against him.

4. Whether limitations placed upon the cross-examination of a government witness who gave testimony essential to the government's case deprived petitioner of his Sixth Amendment right to confront the witnesses against him.

CONSTITUTIONAL PROVISION INVOLVED

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Petitioner and three co-defendants, Persico, Albanese and Spero, have been tried five times on a 1960 indictment charging them with hijacking and conspiring to hijack a truck loaded with merchandise moving in interstate commerce from the Akers Motor Lines Terminal in Brooklyn, New York, on or about July 28, 1959.[1] The first trial, in May, 1961, ended in a jury disagreement. The second trial, in June, 1961, resulted in the conviction of petitioner and the three co-defendants on both counts, but the convictions were reversed on appeal. *United States* v. *Persico*, 305 F.2d 534 (2d Cir. 1962). The third trial, in the spring of 1963, ended with a mistrial as to Persico, Albanese and Spero[2] and a jury disagreement as to petitioner. The fourth trial ended in April, 1964, with the conviction of petitioner and the three co-defendants on both counts, but the convictions were again reversed on appeal. *United States* v. *Persico*, 349 F.2d 6 (2d Cir. 1965).

[1] The indictment also named as defendants Joseph Magnasco, who was shot and killed after the second trial but before sentencing, and George LaFante, who was acquitted at the fifth trial.

[2] The mistrial was declared because Persico was shot and wounded on a Brooklyn street while the trial was in progress.

In the fifth trial, April-May, 1968, the jury convicted petitioner and the three co-defendants on both counts. On October 11, 1968, following the submission of post-trial motions, the trial judge distributed to all parties a memorandum and order he intended to file, dismissing the indictment.[3] In the memorandum, the trial judge rejected each of the specific claims for relief made in the post-trial motions. However, in evaluating the totality of the circumstances surrounding the repeated efforts of the government to obtain a conviction, the trial judge concluded:

> "that the history of the present case through the date of verdict in the fifth trial, *including the overall inadequate fairness of the fifth trial*, reflects transgression of the due process limitations upon governmental rights of retrial and orderly deliberateness in seeking retrial." App. B, p. 34a. (Emphasis added.)

The government successfully sought mandamus from the Court of Appeals compelling the trial judge to enter judgment on the jury verdicts and to impose sentence. *United States* v. *Dooling*, 406 F.2d 192 (2d Cir.), *cert. denied*, 395 U.S. 911 (1969). Petitioner was then sentenced to nine years on each count, the sentences to run concurrently. The Court of Appeals affirmed.

No useful purpose would be served by reciting at length the evidence upon which petitioner's conviction was based. The facts are set out fully in the Court of Appeals' two earlier decisions in the case. See 305

[3] Because the trial judge's post-trial memorandum contains findings relevant to the claims made in this petition, that memorandum is reprinted as Appendix B to this petition. It will be cited in the petition as Post-Trial Memorandum.

F.2d at 336; 349 F.2d at 9. The questions presented by this petition pertain solely to the circumstances surrounding the testimony of two government witnesses—Joseph Valachi and Gasper Vaccaro.

A. Valachi's Appearance as a Witness

On April 16, 1968, in the middle of the trial, the government announced that its next witness would be Joseph Valachi, the government informant who gained national notoriety in 1963 when he revealed the inner workings of the Cosa Nostra at televised congressional hearings. T. 2094, 2097-99. The announcement was made in open court in full hearing of the press, T. 2209-13, but out of the presence of the jury.[1] Valachi had not been a witness at any of the four earlier trials,[2] and the government's curt disclosure of his appearance shocked and stunned defense counsel.[3] See T. 2094-97.

The consequences of the government's surprise announcement in open court were, or at least should have been, predictable. *Cf.* T. 2168-69. Literally overnight a trial that had aroused little interest, T. 2209, became

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[1] The jury had been permitted to take a short break just before Valachi's name was mentioned by the government attorney. T. 2094. Shortly after extended argument began over the propriety of calling Valachi as a witness, the jury was excused for the day. T. 2118.

[2] Indeed, until the fifth trial, Valachi had never testified for the government at any trial. T. 2161.

[3] The trial judge was not quite as surprised as defense lawyers since he had signed a writ of habeas corpus *ad testificandum*, prior to the presentation of any evidence, to permit the government to transport Valachi from a prison in Milan, Michigan. T. 2132, 2264-66. But it is apparent that the trial judge did not expect the announcement of Valachi's appearance to be made in open court. T. 2095.

headline news in New York newspapers and the subject of repeated reports on radio and television news programs. E. 2216-17, 2230, 2234-37. Perhaps the most comprehensive and most prejudicial story appeared in the New York Daily News on the morning of April 18, 1963, under the banner headline "CALL VALACHI IN COSA TRIAL." The Daily News story is reproduced in footnote 6 of the Court of Appeals' opinion. App. A. pp. 82a-87a. The Court of Appeals succinctly summarized the most damaging aspects of the resultant publicity:

> "[T]aking the publicity at its worst it indicated that the appellants were connected to the Cosa Nostra; that Persico was nicknamed the Snake and had graduated out of the Profaci mob; that a special prosecutor from the Department of Justice was trying the case; that Valachi was a former underworld figure who had previously testified concerning organized crime; that the government was concerned for Valachi's safety; and that the admissions about which Valachi was to testify had been made to him while appellants were in prison." App. A. p. 84.

The barrage of publicity prompted the trial judge to question the jurors and alternates to determine the extent to which they had been exposed to the news reports. E. 2200-2207. The Court of Appeals summarized as follows the results of that inquiry:

> "Three jurors stated they saw only newspaper headlines; ten had read all or part of the article in the New York Daily News and one had read the account contained in Newsday, a Long Island newspaper. In addition, some of the jurors stated that they were exposed to radio and television reports of the trial, which contained essentially the same material appearing in the newspaper articles. It

> is also possible that at least one of the jurors read the articles contained in the New York Times and/or the New York Post." App. A, p. 8a, n. 7.

The trial judge admonished each juror to disregard the contents of the news reports, and he asked each juror if he or she could decide the case fairly despite the publicity. One juror said she did not know whether her decision would be influenced by the publicity. T. 2290. The others said they felt they could render a fair and impartial decision.

The trial judge then denied defense motions for a mistrial and Valachi was permitted to testify. Valachi's testimony related to conversations he had had several years earlier with two of the defendants in a New York City jail. As to the first conversation, with defendant Albanese in June 1961, Valachi testified:

> "Well, he [Albanese] went on to tell me that this fellow Chink used to go out with him and his friends,[7] and he mentioned Junior and—" T. 2781.[8]
>
> * * *
>
> "Then he went on to tell me how this Chink used to go out with him on hijacking and—including the Aker job . . . . Including the one they were arrested for." T. 2786-87.

Motions for a mistrial based on that testimony were denied.

As to the second conversation, one with defendant Persico in 1959 or 1960 at which petitioner and de-

[7] Petitioner's trial counsel noted that, when Valachi spoke the words "his friends," he nodded toward the defense table where petitioner and his co-defendants were seated. T. 2783.

[8] Vaccaro is known as "Chink" and Persico is known as "Junior."

fendant Albanese were present. T. 2789. Valachi testified as follows:

"Q. Mr. Valachi, what did this conversation relate to?

"A. Junior called Albanese and McIntosh. He wanted them to hear what he was going to ask me.

* * *

"Q. Will you tell us the subject matter of the conversation, did it relate to any

* * *

"A. He wanted some advise [sic]. He knew I'd been around. I knew who he was, he knew who I was, through friends. He wanted to know that he told me he'd been paying taxes on all the hijackings that he's been pulling especially the one that he was on trial for, the Aker's truck. He paid Joe Profachi [sic] $1800. He wanted to know if he was in his rights having trouble with Joe Profachi.

"Well, in my experience I was astounded —

* * *

"Q. Will you give us the rest of the conversation, please?

"A. I told him it was not taxes at all, it was an out and out shakedown and he was 100 per cent right in having trouble with Joe Profachi.

"Q. Did Mr. Persico say anything to Mr. Albanese or to Mr. McIntosh in your presence?

"A. He told them in the future, 'Pay attention to Joe. Listen to him. You want any advise [sic], ask him.' That's all." T. 2790-93.

Again, motions for a mistrial based on Valachi's version of the conversation were denied. Subsequently, the trial judge instructed the jury that Valachi's testimony could be considered only against Albanese and Persico. T. 2948-50, 4510-11.

inhibit cross-examination. T. 1552-53. The trial judge also noted that two defendants in the case had already been shot. T. 1561; see also notes 1 & 2, *supra*.

Subsequently, Vaccaro returned to the witness stand and, out of the presence of the jury, said he did not wish to answer the questions because "I fear for my life." T. 1658. The trial judge then denied motions to compel answers or to strike Vaccaro's testimony on the grounds that "[his Vaccaro's] identity is known to the defendant and that the testimony sought to be adduced . . . would not materially add to the attack on the witness' character, since they are only collateral issues." T. 1661. The trial judge also stated there was "no reason whatever to doubt the sincerity of the witness' statement that his unwillingness to testify as to his residence since he left prison is based on the ground that he fears for his life." T. 1661. As a result of these rulings, the only information obtained concerning Vaccaro's background since he had left prison three years earlier was that he was then working in a factory and that he had previously been unemployed for three months and worked short periods as a short order cook, a hamburger grill man, and a part-time dishwasher. T. 1640-44.

REASONS FOR GRANTING THE WRIT [11]

1. Only the government knew that it would call Valachi as a witness.[12] Therefore, it had exclusive control over the timing and place of the announcement

[11] In addition to the reasons discussed below for granting the writ, petitioner adopts by reference any other grounds for relief asserted by his three co-defendants in the separate petition they will file with the Court.

[12] Although the trial judge had signed the necessary papers to make Valachi available at the trial, see note 5, *supra*, he clearly

of Valachi's imminent appearance at trial. In addition, the government was quite conscious that its decision to call Valachi would cause a furor at trial. See T. 2115. Finally, the government had been specifically admonished by the trial judge to reveal to him and to defense lawyers privately any witness not on the government's pre-trial witness list before making such a revelation in open court. T. 2095.

Under these circumstances, it was clear misconduct for the government to make its surprise announcement, without any warning, in open court. Such a public announcement in the presence of news reporters served absolutely no legitimate government trial interest. The only conceivable "advantage" to be gained from the public announcement was greater public attention for the trial through the news media. The government achieved that result and, in the process, shattered any hope that the petitioner might obtain a fair trial before an impartial jury.

Had the government complied with the trial judge's admonition and revealed Valachi's pending testimony privately, there would have been an opportunity to explore possible prophylactic measures to keep from the jury the publicity that would inevitably flow from Valachi's appearance. For example, the jury could

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did not know that the government had decided to call Valachi as a witness.

At trial, the government made a disingenuous effort to attribute to defense counsel an awareness of Valachi's impending testimony. At a proceeding prior to the fourth trial, one defense lawyer had made passing reference to Valachi as a possible government witness. T. 2124-30. However, Valachi did not appear as a witness at the fourth trial and, as the trial judge observed, "it is very difficult to see how even a suspicious adversary could have anticipated that Valachi would be called." Post-Trial Memorandum, App. B, p. 23a.

have been sequestered until the end of the trial. Or there could have been an agreement to keep Valachi's appearance secret until he actually entered the courtroom and then to take measures to keep the resultant publicity from the jury.[13] But none of those measures were possible when the government made the deliberate decision to announce Valachi's forthcoming testimony in open court without prior warning to defense counsel and the trial judge.

This Court has long recognized that the government's obligation in a criminal prosecution "is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). The Court also aptly stated the scope of the obligation imposed on a prosecuting attorney:

> "He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Id.*

The government in this case clearly breached its obligation to assure petitioner a trial before an impartial jury by disclosing Valachi's imminent appearance at trial in a manner calculated to assure maximum impact of the prejudicial publicity on the jury.

That the publicity was highly prejudicial is beyond dispute. Newspaper stories and news broadcasts not only linked petitioner and his co-defendants with the Cosa Nostra, but also recited that petitioner had been

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[13] When the jury was excused for the day shortly after the government announced that Valachi would be its next witness, the trial judge gave no admonition that the jurors should not read news reports of the trial. See T. 2118.

tried four times previously for the same crime and had met Valachi while he was in prison. In his Post-Trial Memorandum, the trial judge stated that "[t]he publicity was certainly, by legal standards, prejudicial matter."[11] App. B, p. 24a. It is also established beyond dispute that the jurors received broad exposure to the intensive and highly prejudicial publicity. As the trial judge commented at trial:

> "Now, I think it is idle to say that prejudicial matter has not been published in the newspapers and come to the notice of the jurors; they have said so. That it is prejudicial by the standards by which prejudice is measured for any proper purpose for which prejudicial statements can be measured seems to me self-evident." T. 3603.

It is clear, therefore, that the government's misconduct had its calculated effect of depriving petitioner of his Sixth Amendment right to a fair trial before an impartial jury. For that reason alone, petitioner's conviction must be reversed.

2. Even apart from the government's culpability for the prejudicial publicity that infected petitioner's trial, the very fact of that publicity deprived petitioner of a fair trial and compels a reversal of his conviction under the principles declared by this Court in *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966). Both courts below rejected this argument by stressing that the publicity did not relate to petitioner's guilt of the crime for which he was being tried and that the jurors

[11] Despite the trial judge's express findings on the issue of whether the publicity was prejudicial, the Court of Appeals inexplicably stated that "the publicity was not inherently prejudicial." App. A, p. 12a. It is, of course, clear that the trial judge's findings on the issue of prejudice are entitled to more weight than the Court of Appeals' assertion to the contrary.

indicated on voir dire that they could reach a verdict uninfluenced by the publicity. Neither conclusion will withstand analysis.

To suggest that the publicity was somehow less harmful because it did not accuse petitioner of the crime charged is to wink at reality. It would have been easier for petitioner to meet that accusation at trial than it was to counteract news stories linking him to the dreaded Cosa Nostra. *Cf. Marshall v. United States*, 360 U.S. 310, 313 (1959). Indeed, the trial judge repeatedly told the jurors when he questioned them about the news stories that "[t]here is no place where they [the defendants] can defend themselves" against the link with the Cosa Nostra, T. 2381, and that "these men cannot defend themselves against [the Cosa Nostra charge], they can't come in and try to negative this at all." T. 2355. The inevitable effect of the news stories was to cast an aura of criminality about petitioner in the minds of the jurors.

Similarly, whether the publicity deprived petitioner of a fair and impartial trial cannot be resolved merely by reference to assurances by the jurors that they can reach an impartial result despite the publicity. For example, in *Marshall v. United States*, 360 U.S. 310, 312 (1959), this Court was not persuaded by the statement of each juror "that he would not be influenced by the news articles, that he could decide the case only on the evidence of record, and that he felt no prejudice against the petitioner as a result of the articles." See also *Irvin v. Dowd*, 366 U.S. 717, 728 (1961). Even the trial judge here said:

> "I think it would be rather difficult to say that the jurors reading this material could look at the evidence in quite the same way. . . . I think it

> can be taken as given that they have read this material intelligently and that they would be superhuman if they were able to present to us a reliable estimate of its affect on their judgment." T. 3268-69.

The trial judge also concluded that interrogation of individual jurors concerning the impact of the pre-judicial publicity cannot be conclusive under this Court's decision in *Sheppard v. Maxwell*, *supra*. T. 3268. Such interrogation is specially inconclusive when, as here, not all the jurors give assurances of impartiality. See T. 2391.

It is equally clear that in addition to the jurors' disregard the prejudicial publicity are powerless to cure the prejudice. In *Bruton v. United States*, 391 U.S. 123, 135 (1968), this Court recognized that curative instructions will be wholly ineffective where the risks are great that the jury will not follow them and where a defendant will suffer severe consequence from such a failure. In this case, the publicity about Valachi exposed the jury to information that would have been clearly inadmissible if offered by the government. Further, the prejudicial publicity transformed petitioner and his co-defendants, who were virtually unknown to the jurors at the start of the trial, into members of a sinister and dreaded secret criminal organization. Only "superhuman" jurors could put that invidious effect aside in their deliberations.

While the prejudicial publicity in this case was not of the same volume and duration as that in *Sheppard v. Maxwell*, *supra*, its impact was no less shattering to petitioner's hope for a fair trial. In light of jury disagreements as to petitioner's guilt or innocence in two previous trials, the reversal of this conviction in two

others and the "merely marginal fairness" of the fifth trial, it would be hard to say that publicity of even a low degree of virulence would not have been influential in producing a conviction at the fifth trial. The publicity here, by comparison, had an absolutely pestilential effect, amounting to a denial of petitioner's Sixth Amendment right to a trial by an impartial jury.

3. Valachi's testimony about his conversations with Albanese and Persico violated petitioner's Sixth Amendment right to confront the witnesses against him, as that right was defined by this Court in *Bruton v. United States*, 391 U.S. 123 (1968). In *Bruton*, this Court ruled that testimony about an out of court incriminatory statement by one defendant which implicates a co-defendant is reversible error as to the co-defendant when the defendant who made the statement does not testify and thus is not subject to cross-examination. *Bruton* specifically held that instructions that the jury should consider the statement only against the defendant making it are not "an adequate substitute for the petitioner's constitutional right of cross-examination." 391 U.S. at 137. Although the Court conceded that limiting instructions might be effective to counteract some forms of inadmissible evidence, the Court also recognized that

> "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequence of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." 391 U.S. at 135.

The "risk" and "consequences" that the Court contemplated are surely present in this case.

In the conversation with Albanese that Valachi related, Albanese said that he and "his friends" went out on hijackings together, including the Akers job for which "they" were arrested. T. 2781, 2786-87. Without analysis, the Court of Appeals simply rejected petitioner's claim that he was implicated in the offense charged by Albanese's reference to "his friends" and "they." But petitioner's claim cannot be so lightly dismissed. The jury could well have understood that "his friends" and "they" included more persons than Vaccaro and Persico, both of whom Albanese referred to by name. It would seem inevitable that the jury would proceed from that understanding to the conclusion that those charged with Albanese in the conspiracy count were the "friends" and the "they" to whom he was referring.[15] There was at least a great "risk" that the jury would identify petitioner as one of the "friends" implicated by Albanese in the crime charged, and limiting instructions could not obviate that risk.

Valachi's account of his conversation with Persico was even more damaging to petitioner. Valachi began that portion of his testimony by stressing that Persico summoned petitioner and Albanese to hear what he had to say to Valachi. T. 2790. Then, as related by Valachi, Persico complained that he had been forced to pay "taxes" to Profaci "on all the hijackings he's been pulling," including the one for which petitioner was being tried. T. 2792. Finally, Persico admonished petitioner and Albanese to pay attention to Valachi and to seek out his advice and counsel. T. 2793.

[15] There can be no doubt that the implicated co-defendant need not be identified by name in the incriminating statement. See *United States* v. *Serio*, 401 F.2d 989 (D.C. Cir. 1968) (identification of appellant as "another man" sufficient for application of the *Bruton* rule).

Both courts below rejected petitioner's *Bruton* grounded objection to the testimony because Persico did not in express terms accuse petitioner of participation in the criminal [illegible] Valachi could have been cross-examined as to whether he observed any acquiescence by petitioner in the command that he pay attention to Persico. But that reasoning ignores the essential basis for the objection. From what appears in the record, the whole point of Persico's conversation with Valachi was to complain about Profaci's demand for a share of the proceeds of several hijackings, and particularly the hijacking of the Akers truck. But, before he spoke to Valachi about those matters, Persico took special pains to have petitioner and Albanese in a position to hear the conversation. To the jurors, there could have been only one explanation for Persico's desire that petitioner and Albanese listen to the conversation: petitioner and Albanese had an interest in the proceeds of the hijackings Persico discussed. Consequently, Valachi's account of the conversation with Persico linked petitioner to the crime for which he was being tried as firmly as if Persico had accused him of complicity.

To rule, as the court below did, that an express statement of complicity is essential to invoke the *Bruton* rule would be to substitute formalism for the substance of the constitutional right to confront witnesses. Because neither Albanese nor Persico testified, Valachi's account of his conversations with them deprived petitioner of his Sixth Amendment right of confrontation, as the right was defined by *Bruton*.

4. The restrictions placed by the trial judge on the scope of cross-examination of Vaccaro present im-

portant questions concerning the application of this Court's decision in *Smith* v. *Illinois*, 390 U.S. 129 (1968), and petitioner's Sixth Amendment right to confront the witnesses against him. These restrictions, and their endorsement by the Court of Appeals, represent a clear departure from the letter and spirit of the *Smith* decision and the Sixth Amendment.

In *Smith*, after noting that the key prosecution witness had given a false name and that "the petitioner was denied the right to ask the . . . witness either his name or where he lived," the Court stated:

> "[W]hen the credibility of a witness is in issue, the very starting point in 'exposing falsehood and bringing out truth' through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness' name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself." 390 U.S. at 131.

This was no novel principle of law. The Court was simply reaffirming and applying to state trials its earlier decision in *Alford* v. *United States*, 282 U.S. 687 (1931), which noted that "[p]rejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test." 282 U.S. at 688.

The reasons given by the trial judge for restricting the scope of cross-examination are simply at odds with this Court's decisions. First, the trial judge thought information about Vaccaro's present and former addresses and places of employment was unnecessary be-

cause the witness' identity was known to the defendants. P. 1661. In *Smith*, however, even though the cross-examiner knew the witness in question and had even represented him previously, 390 U.S. at 131, n. 6, this Court ruled it was improper to prevent inquiry into the witness' current address. Accord *United States* v. *Garafalo*, 385 F.2d 200 (7th Cir. 1967), *rev'd per curiam*, 396 F.2d 952 (7th Cir. 1968); *United States* v. *Lyon*, 397 F.2d 505 (7th Cir. 1968); *United States* v. *Pickens*, 417 F.2d 958 (8th Cir. 1969).[16] In this case, petitioner knew who Vaccaro was because Vaccaro had testified at the previous trial. However, four years had elapsed since his prior testimony, and Vaccaro had been released from prison during that interval. Petitioner had no knowledge of the community in which Vaccaro had been living since his release from prison, and the questions foreclosed by the trial judge sought to elicit that information.

A second reason given for limiting cross-examination was that "the testimony sought to be adduced . . . would not materially add to the attack on the witness'

[16] In three decisions subsequent to *Garafalo* and *Lyon*, the Seventh Circuit has been somewhat more restrictive in the latitude permitted on cross-examination under the *Smith* rule. See *United States* v. *Lee*, 413 F.2d 910 (1969); *United States* v. *Lawler*, 413 F.2d 622 (1969); *United States* v. *Teller*, 412 F.2d 374 (1969). But all three of those decisions are distinguishable under the facts of this case. In both *Teller* and *Lee*, defense counsel were permitted to develop on cross-examination that the witness had received special consideration from the government for his testimony. In *Lawler*, the testimony of the witness in question was not important to the government's case.

In *United States* v. *Norman*, 402 F.2d 73 (9th Cir. 1968), the court sustained a limitation on cross-examination when the witness invoked the privilege against self-incrimination.

opinion in *Smith* suggested that the Court's holding in that case would be limited in situations in which "inquiries . . . tend to endanger the personal safety of the witness." 390 U.S. at 133-34. And some lower courts have ruled that restrictions on cross examination are proper where there is proof of actual threats of harm to the witness. *United States* v. *Baker*, 419 F.2d 83, 87 (2d Cir. 1969); *United States* v. *Palermo*, 410 F.2d 468, 472 (7th Cir. 1969), or where there was evidence of danger to the witness and the defendant gave no reason for the inquiries. *Kirschbaum* v. *United States*, 407 F.2d 562, 565 (8th Cir. 1969).[17]

In this case, there is no proof of any actual threats made to Vaccaro to substantiate his testimony that he feared for his safety if he revealed his addresses and places of employment. In fact, since his testimony about his fears is wholly uncorroborated,[18] the ruling amounts to making Vaccaro the arbiter. The trial judge simply stated there was no reason to doubt the sincerity of Vaccaro's assertion that he feared for his life. T. 1661. However, when information is sought for the very reason of attacking a witness' credibility, it is wholly anomalous to deny that information on the basis of the witness' apparent sincerity.

[17] In both *Baker* and *Palermo*, despite proof of actual threats against the witnesses, inquiry into prior addresses was permitted. In this case, even prior addresses were denied petitioner.

[18] The government's only effort to substantiate Vaccaro's testimony was an observation that a witness in *another* case in the same court recently had been killed or had disappeared. T. 1552. The trial judge noted that two defendants in this case had been shot previously. T. 1561; notes 1 & 2, *supra*. But there was no proof or suggestion that any witnesses in the case had been threatened or harmed.

Consequently, because there was inadequate proof of any danger to the witness and because an adequate foundation was laid for the inquiries, petitioner was denied his Sixth Amendment right to confront the witnesses against him when inquiry into Vaccaro's present and past addresses and places of employment was foreclosed. The resultant error can in no sense be considered harmless or inconsequential. Vaccaro's testimony was critical to the government's case, and an attack on his credibility was essential to the defense. It is precisely for that reason that, absent exigent circumstances, the Sixth Amendment demands that petitioner be allowed the broadest possible latitude in cross-examining Vaccaro. The record is barren of any exigent circumstances that would justify curtailment of petitioner's Sixth Amendment rights.[19]

[19] A *Smith-Alford* issue also arose in connection with the testimony of Joseph Cancelli, another government witness. When asked out of the presence of the jury why he declined to reveal his address, Cancelli responded, "for personal reasons. . . . I just don't want to give it for my family." T. 3194-95. The trial judge declined to require Cancelli to answer the question and the Court of Appeals affirmed that ruling, in part because Cancelli's testimony "was not of central importance" to the government's case. App. A. p. 16a. However, there was absolutely no evidence that Cancelli feared for his safety or his family's. In fact, unlike Vaccaro, he did not even express such a fear. A plausible explanation for his words "for personal reasons" and "for my family" is that Cancelli simply wanted to shield himself and his family in their community from any publicity that might result from his testimony. Absent some evidence of fear for a witness' safety, there can be no justification for limiting cross-examination. The rulings of the courts below on the Cancelli testimony simply illustrate the consistent refusal of those courts to afford petitioner his Sixth Amendment rights, as defined by *Smith* and *Alford*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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